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IN THE

Supreme Court of the United States of America.

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased, *Appellant,*

vs.

STATE OF MAINE, *Appellee.*

Motion on Behalf of the Tax Commission of the State of New York for Leave to File Brief as *Amici Curiae* and Brief.

SETH T. COLE,
Counsel for Amici Curiae.

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COME NOW, Thomas M. Lynch, John J. Merrin and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiae*.

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Brief on Behalf of the Tax Commission of the State of New York as Amici Curiae.

Statement.

In this case a determination by this Court is sought on the most serious current question relating to the imposition of death taxes by the states, and the decision will rank among the most important in that field of law. The question is whether the state in which a corporation is domiciled may impose an inheritance or transfer tax upon

shares of stock of such corporation owned by a nonresident decedent and transferred at and by virtue of the death of such decedent. Necessarily, the decision will apply to laws imposing estate taxes as well as those which impose inheritance taxes, because the fundamental issue is one of jurisdiction to impose a death tax and is not confined to a particular form of the tax. If there be jurisdiction to impose an inheritance tax, that same jurisdiction will permit the imposition of an estate tax, and, if there be not jurisdiction to support the one kind of tax, there cannot be jurisdiction to support the other.

The decedent in this case died in 1924 and at the time of his death was domiciled in the State of Massachusetts, where his will was probated. The assets of his estate included certain shares of stock in the Great Northern Paper Company, a corporation of the State of Maine, the property of which was principally located in Maine. It is conceded by the parties to the proceeding that at the time of the decedent's death the certificates representing the stock were physically within the State of Massachusetts and that they did not have a business situs in the State of Maine, although it is not believed that these points are material to the determination of the issue.

This brief is offered on behalf of the Tax Commission of the State of New York because said Commission deems it to be of paramount public interest that a sound and logical system of death taxation be established and maintained, not alone in the State of New York, but throughout the United States. With increased demands upon national and state treasuries and reduced yields of present taxes making necessary the enactment of laws increasing the rates of existing taxes and the tapping of new tax resources, it

is of the utmost importance that equitable principles of taxation should prevail and that, so far as is possible, friction between the states and the Federal Government on the one hand, and among the states themselves on the other, should be reduced to a minimum. This Court has recognized that multiple death taxation by the states does not comport with sound principles of taxation. It is also undoubtedly true as a matter of policy, that the assets of a decedent's estate should be subjected to taxation but once. It is thought that both principle and policy find support in the basic law embodied in the Constitution of the United States and that the same prevents the levying of taxes by more than one jurisdiction. The New York Tax Commission believes that the present is a crucial period in the development of death taxation in this country and that a false step may make it difficult for the states to retain the death tax as a source of substantial revenue.

Argument.

POINT I.

The Fourteenth Amendment to the Constitution of the United States prohibits any state, other than that in which a decedent was domiciled at the time of his death, from imposing a death tax with respect to any of the intangible personal property owned by such decedent.

True it is that there has been some confusion of thought concerning the power of a state, other than that in which a decedent was domiciled, to exact contributions in the form of death taxes upon the transfer of his intangible personal property. Until recently, the tendency was to-

ward a liberal construction of state powers in that direction. In January, 1930, in *Farmers' Loan and Trust Co. v. Minnesota,* 280 U. S. 204, this Court, in a broad and sweeping decision, gave recognition to the evils which had developed as a result of the exercise of these powers and which were sanctioned, in part at least, by its former decisions, and, abandoning the old landmarks, set a new course in keeping with the spirit, thought and economic development of the present day. In so doing, it put the case of *Blackstone v. Miller,* 188 U. S. 189, and other cases supporting it, on the *Index Expurgatorius.* (see Mr. Justice Holmes' opinion in *Baldwin v. Missouri,* 281 U. S. 586).

Examination of the Minnesota and Missouri opinions, together with the opinion in *Beidler v. South Carolina Tax Commission,* 282 U. S. 1, indicates that this Court has definitely taken the position that double or multiple taxation of transfers at death is not permitted by the Fourteenth Amendment. In the Minnesota case, Mr. Justice McReynolds said (p. 209):

> "*Blackstone v. Miller, supra,* and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the 14th Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable."

It is, of course, conceivable that this Court may limit the Minnesota case, and the subsequent Missouri and South Carolina cases, to the specific facts with which they were directly concerned and hold that under different facts, or in respect to intangibles of a different character, double or multiple death taxation is not prohibited, but a careful study of the opinions in these cases affords no basis for anticipating such action. Possibly it may be decided that intangibles which had acquired a business situs in a state in which the deceased owner was not domiciled may be taxed by both the state of his domicile and that of business situs, or, where the deceased owner of shares of corporate stock and the corporation issuing such shares were domiciled in different states, that each state may tax the shares. It is also possible that a rule of single taxation may be laid down under which the domicile of the decedent may not be permitted to tax certain intangibles as, for example, that corporate shares may be taxed only by the state of domicile of the corporation or that intangibles having a business situs may be taxed only by the state in which the business is carried on. Still another possibility is that under the doctrine of *Corry v. Baltimore*, 196 U. S. 466, the state of domicile of the corporation may be permitted to collect a death tax where its laws fix the situs of the shares within its boundaries, such tax to be either exclusive or in addition to a tax by the state of domicile of the owner, but, in the absence of a law so fixing the situs of the shares, the death tax to be collected only at the domicile of the owner. The bare existence of these and other possible conflicts of jurisdiction indicates the desirability of a system under which the death taxation of all intangibles will be permitted at the decedent's domicile and restricted to that jurisdiction. It is at the domicile of the decedent that his estate is usually administered, and it is there that

the death tax processes may be cared for in an orderly manner. Taxation at the domicile of the decedent also eliminates the possibility of a shift of incorporated companies to states which do not impose death taxes for the purpose of relieving shareholders from their burden, which might occur if the state of domicile of the corporation alone should be permitted to impose the tax. There are evidences that in the past such changes in incorporation have taken place for the purpose of avoiding nonresident death taxation (See Proceedings National Tax Association, 1926, pp. 328-329). Such taxation also prevents the man of wealth from evading taxation by organizing a holding corporation in a state which has no death tax and transferring to it all of his intangible assets, thereby depriving the state of his domicile of all death taxes with respect thereto.

The State of New York has already framed its death tax law in such manner that no attempt is made to reach intangibles of nonresident decedents (see Chapter 710, N. Y. Laws of 1930). By this chapter a new article imposing an estate tax was added to the Tax Law, and to Section 249-p thereof was appended the following legislative note:

> "Note.—This section imposes a tax on real property situated and tangible personal property having an actual situs in this state forming part of a nonresident estate. Such tax is a pro rata share of what the tax would be on the gross estate of such a decedent, except that real property situated and tangible personal property having an actual situs outside the state is not included in the calculation for the reason that similar properties owned by a resident decedent are not included and to include them in the case of a nonresident decedent might be discriminatory, although authority for so doing may possibly be found in the case of Maxwell v. Bugbee, 250 U. S. 525. In view of the extent of the reciprocal death tax exemption movement throughout the United States and the recent de-

cision in Farmers' Loan and Trust Company v. Minnesota, 280 U. S. 204, no provision whatever is made for imposing a tax with respect to intangible personal property of a nonresident decedent, even though it may consist of shares of stock in a domestic corporation or intangible property which has a business situs in this state."

Several other states do not attempt to tax intangibles owned by nonresident decedents.

The reasons advanced for permitting double taxation of the intangibles involved in the Minnesota, Missouri and South Carolina cases were fully as potent as can be presented for double taxation because of business situs or corporate domicile, and the considerations which favor the elimination of multiple death taxation are equally strong without regard to what the facts may be as to the situs or the nature of the intangibles. Assuming, therefore, that multiple death taxation of intangibles is to be proscribed; let us consider what state has the power to impose the single tax. Is it to be the state of domicile of the decedent in all cases, or the state of domicile of the corporation in the case of corporate shares, the state of business situs where the intangibles have such a situs, or possibly some state other than that of the decedent's domicile for some other reason?

From the standpoints of economy and correct tax theory, it would seem that the best interests of the states will be served if it be determined that all intangible personal property may be subjected to death taxation at the domicile of the owner and not elsewhere. Very few, if any, of the states would wish to forego the right to tax certain intangibles of residents for the privilege of taxing similar

intangibles of nonresidents, and such procedure would not be in accord with what has come to be generally recognized as the sound principle of death taxation.

This Court is conversant with the movement for reciprocity in death taxation which has been under way since 1924. It is described in detail in the brief filed on behalf of the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, as *amici curiae,* in *Blodgett v. Silberman,* 277 U. S. 1. Reciprocity is based upon the principle that the state of domicile of a decedent has power to impose a death tax on all of his intangibles, and the movement has received official sanction in more than three-fourths of the states.

The progress of reciprocity is shown by the report of the Committee of the National Tax Association on Reciprocity in Inheritance Taxation to the Twenty-second National Tax Conference held in 1929 (see Proceedings National Tax Association, 1929, pp. 200-226). It was summarized in the following language (p. 203):

> "The great success which has attended the campaign for reciprocity during the current year seems to indicate that in a short time the duplicate taxation of inheritances by the states will be abandoned absolutely. At the present time, thirty-seven states, the District of Columbia, the Territory of Hawaii, the Province of Ontario of the Dominion of Canada, and the Territory of the Yukon, have cooperated in this movement to abolish double inheritance taxes, leaving but eleven states, these chiefly of the west.
>
> "It is interesting to note that the entire Union east of the Mississippi River, except the State of Kentucky, is in the movement.
>
> "Turning to statistics, it is interesting to note that assuming that the population of the United States

is 105,000,000, as it was in the census of 1920, 91,398,578 may now die peacefully with the assurance that there will be no duplicate taxation by the states upon the intangible assets of their estates."

Should it be decided that the state of domicile of a decedent has not the power to assess a death tax with respect to any of his intangibles, regardless of their character or where situated, the reciprocity movement would be given an effect directly contrary to its purpose. If it should be held that shares of corporate stock are taxable only by the domicile of the corporation, or that intangibles which have a business situs are taxable only by the state of such situs, and the state of domicile of the corporation, or that of the business situs, as the case might be, should have a reciprocity law, it would be prohibited from exercising its power of taxation until such time as such law might be repealed. In the majority of the states, the legislature does not meet annually, and in many states, unless special sessions were called; there would necessarily be a considerable period of time during which such intangibles would be entirely exempted from taxation. The confusion, inconvenience and loss of revenue which would follow from denying the state of domicile of a decedent the power to exact a death tax on account of any of his intangibles cannot be overemphasized.

If the decision should be that the state of his domicile alone has the power to tax all intangibles of a decedent, reciprocity statutes would become superfluous, but no harm would result, as such a decision would effectually and completely bring about the end for which reciprocity was intended.

Reciprocity was designed to make effective the second of the principles enunciated in the report of the committee

appointed by the National Conference on Inheritance and Estate Taxation, viz: that all intangible personal property should be subjected to death taxation but once and by the state of domicile of the decedent (see Reports of Proceedings of National Conferences on Inheritance and Estate Taxation held at Washington, D. C., February 19-20, 1925, and New Orleans, La., November, 1925). The reports of these Conferences show that the best thought of economists, business men and tax officials throughout the Nation is in accord on the principle that the state of a person's domicile should have the power to impose a death tax on all of his intangibles, to the exclusion of all other states.

Another aspect of a decision that corporate stock may be taxed only by the domicile of the corporation should be noted. An illustration based upon actual facts will be used. A copper magnate is domiciled in the State of New York at the time of his death. He is possessed of a large fortune represented principally by shares of stock in a corporation owning copper mines in Montana. The mining corporation was organized under the laws of Maryland and is domiciled there. There are substantial reasons why New York, the state of the decedent's domicile, should have the power to levy a death tax on his intangible wealth. The owner resided there and his wealth as well as his person had been protected by its laws. Strong reasons may also be advanced in favor of permitting Montana to collect a death tax. The corporation owned its property and carried on its business there, and the decedent's wealth was the product of its mines. What can be said in favor of a tax by Maryland? The corporation maintained an office there, it is true, but that was merely for the purpose of complying with legal requirements. The corporation did no business in that state and had its

domicile there only for reasons of convenience. Maryland had been repaid for all of the privileges which it granted to the corporation through the medium of taxes levied upon it. Surely, much more could be said in favor of the imposition of a death tax by Montana than by Maryland, but, upon examination of the law, it is found to be definitely settled by this Court that Montana has not the power to tax (see *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69). Are both New York and Montana to be denied a tax in favor of Maryland? Or is the decision to be that the state of the decedent's domicile, which has the strongest legal and equitable claim, is to have the power to tax?

Perhaps the first jurist of distinction to claim that the Constitution of the United States forbade the extraterritorial death taxation of intangibles was Judge Alphonse T. Clearwater of New York, who at the Forty-eighth Annual Meeting of the New York State Bar Association in 1925, in a masterful and emphatic manner, laid bare the abuses of nonresident death taxation and called for action to correct them (see Report of New York State Bar Association, Vol. XLVIII, pp. 242-245). As a result of Judge Clearwater's address, the New York State Bar Association appointed a Committee on Extraterritorial Taxes which has given careful consideration to the subject and has submitted reports in subsequent years (see Reports of New York State Bar Association, Vols. XLIX, L, LI, LII and LIII). Because of the fact that Judge Clearwater was a pioneer in thought on the question under consideration, the Court will be interested in his comment on the Minnesota decision. In a communication to the editor of the New York Times, which appears in the issue of January 19, 1930, section 3, page 5, column 4, he said:

"For several years the taxing authorities of the State of New York and of some other States have imposed upon the estates of decedents holding securities issued by corporations incorporated in or created by a State other than that of the domicile of the decedent an extraterritorial tax; that is, if a resident of New York holding stock in a corporation organized in or created by the laws of another State dies, his beneficiaries have been compelled to pay not only the Federal and New York transfer tax but sometimes a third, fourth and fifth tax imposed by a State under the laws of which the corporation or corporations were organized.

"It frequently has been said that I was the first lawyer in the United States publicly to denounce this system and to characterize it as unconstitutional, illegal, extortionate and iniquitous. At all events, I did so in an address to the members of our New York State Bar Association.

"The Supreme Court of the United States in the case of Frick v. Pennsylvania, 268 U. S. 478, sustained my contention.

"In Blodgett v. Silberman, 277 U. S. 1, in construing Blackstone v. Miller, 188 U. S. 189, it was claimed by some of the refined casuists, of various State taxing authorities, that the Supreme Court had retreated from this attitude in the Frick case.

"I was unable to concur in that view. Diverse opinion, however, is made negligible by the masterly opinion of Justice McReynolds, who on Jan. 6 delivered the opinion of the Court in the notable case of the Farmers' Loan and Trust Company, as sole surviving executor of the last will and testament of Henry R. Taylor, deceased, appellant, v. the State of Minnesota, defendant. In that case, with admirable courage, force and clarity, that distinguished judge brushed aside the ingenious and involved sophistries of the advocates of extraterritorial taxation, pointedly saying that to sustain that doctrine and practice would be 'to disturb good relations among the States and produce the kind of discontent expected to subside after the establishment of the Union, and that the Court is compelled to hold it untenable, and, to pre-

vent misunderstanding, it is definitely overruled.' Justice Stone, in a separate opinion, concurred.

"This decision effectually and finally terminates a practice that is abhorent to any student of the common law of our constitutional system, a system which treats the several States as a Union, not as a mere confederation of distinct and separate sovereignties, and reaffirms the ancient and for centuries undisputed doctrine of the common law, *mobilia sequuntur personam* (things movable go with the person).

* * * * * * * * *

"*Pari ratione* those of us who closely follow the decisions of the Supreme Court of the United States and of the Court of Appeals of this State constantly are impressed not only with conclusion predicated upon universally acknowledged fundamental principles of justice but by an entire absence of technical construction. Every problem courageously is confronted, justly and finally dealt with; there being none of that evasion of responsibility or vacillation not infrequently resorted to by lesser judicatories. Both Courts justly are entitled to that stately appellation of the ancients—august tribunals of justice."

It is now definitely settled that the power to impose a death tax on real property and tangible personal property is lodged with the state of actual situs and that no other state has the right to impose a death tax with respect thereto.

Keeney v. New York, 222 U. S. 525;
Matter of Swift, 137 N. Y. 77;
Frick v. Pennsylvania, 268 U. S. 473.

It is also the established doctrine of this Court that the maxim *mobilia sequuntur personam* is applicable to death taxation of intangible personal property and that the situs of such property owned by a decedent at the time of his death is at his domicile.

Blodgett v. Silberman, 277 U. S. 1, *supra*.

The intangibles owned by the decedent in the case just cited and which were held to have their situs at his domicile included:

(a) Shares of stock in corporations foreign to his domicile, and

(b) Intangibles which had a business situs in a foreign state.

The decedent was a resident of Connecticut. He had an interest as general partner, valued at $1,687,245.34, in the partnership of William Openhym & Sons, doing business in New York and organized under the Limited Partnership Act of New York. He also owned certificates of stock in New York, New Jersey and Canadian corporations appraised at $277,864.25. If it is to be decided that but one death tax may be levied, it is necessary that the power to levy this tax be granted to the state of the domicile of the decedent with respect to all of the intangible personal property involved in the foregoing case, unless this Court is prepared to overthrow its doctrine.

It is urged that it is inconsistent with due process under the Fourteenth Amendment to the Constitution of the United States for death taxes to be imposed at any other place than that where the transfer of the property takes place and that although for special purposes intangible property may have a situs at more than one place the jurisdiction of the situs at which the transfer at death takes place is the only one which has the power to tax. Such transfer, in the case of intangible personalty is made at the owner's domicile. The rule as to situs of transfer would apply alike to real and personal property, tangible and intangible property. It would be simple and equitable and would put an end to many of the perplexing problems

which have made the administration of estates a difficult and complicated matter from the standpoint of death taxes.

If this Court lays down such a rule, it is possible that it will be necessary for it to overthrow some of the *dicta* in the old cases and perhaps to distinguish or discard some earlier holdings. It would seem, however, that such a course is fully warranted at this time when the law of death taxation is being resettled. The major operation was performed when *Blackstone v. Miller* was overruled. Such minor additional excisions as may be found necessary ought not to be viewed with alarm. The doctrine of *stare decisis* should not stand in the way. It is well settled that this doctrine does not apply where a constitutional question is involved. At all times the law must be found in the Constitution itself and the provisions of the Constitution will govern regardless of any construction of it by the Courts. It is evident that the true principles which underlie death taxation have not been clearly understood and applied. Sight seems to have been lost of the fact that death taxes are taxes upon the transfer of the property at the death of the owner and are not subject to all of the rules which apply to other kinds of taxation.

It is unnecessary for the purposes of this brief to argue the question of whether there should be a departure from the principles laid down in some of the earlier cases which justify the state of domicile of a corporation in fixing the situs of its shares within such state so as to permit the imposing of general property taxes. Much might be said in favor of a single situs for general property tax as well as for death tax purposes. That there is a distinction between the two kinds of taxes sufficient to justify a limitation of the power of death taxation to the

state of domicile of the owner of the shares cannot be doubted. This distinction was recognized by this Court as far back as 1874 in *The Delaware Railroad Tax Case*, 18 Wall. 206, when Mr. Justice Field said (pp. 229-230):

> "In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile."

This Court in *Blodgett v. Silberman, supra*, recognized the situs of corporate shares as being at the domicile of the owner for death tax purposes and it seems impossible that a backward step should now be taken in that respect. Unless multiple taxation of corporate shares is to be permitted, the domicile of the corporation must be denied the power to tax.

The Maine Court in its opinion in this case rests the power of the State of Maine to impose the tax upon the proposition that under Maine law the transfer of the shares of stock cannot be completed until the fact of the transfer is recorded on the books of the corporation in the State of Maine. This is a very slender thread, particularly after the disapproval of the doctrine of *Blackstone v. Miller*. The fact is that Maine has no control whatsoever over the transfer of the shares and their devolution upon the death of the owner, and no power to prevent the transfer is asserted, except as an adjunct to a taxing statute. The beneficiaries under Mr. Haskell's will would take good title to

the shares by a transfer from his executor in the State of Massachusetts, and the only right which the State of Maine reserved is in the nature of a protection to the corporation issuing the shares in paying dividends thereon to the record owner in case the transfer is not recorded on the books of the corporation. The transferee would still be the one entitled to the dividends and, after their payment to the executor, as the legal representative of the owner of record, would have a right of action against such executor to recover the same. Therefore, every beneficial interest in the shares would pass to the transferee without regard to the laws of Maine. Surely, it cannot be said that the mere fact that Maine enacted that the corporation should be protected in the payment of dividends to the record holder of shares gives that state any power to impose a death tax upon the transfer thereof.

The Maine statute (R. S. 1916, Chapter 51, Secs. 36-37 [Sec. 36 amended by Chapter 49, P. L. 1919]—Record p. 19) is similar to Section 1 of the Uniform Stock Transfer Act. The Commissioners on Uniform State Laws have interpreted said Section 1 as follows (6 U. L. A. 2):

> "The provisions of this section are in accordance with the existing law (see Cook on Corporations, Section 373 *et seq.*), except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of the corporation becomes thus like the record of a deed of real estate under a registry system."

The interpretation of the Commissioners on Uniform Laws would appear to be applicable to the Maine law and the registry of the transfer of stock would seem to be of no more importance than the recording of a deed.

The point that recording on the corporate books is not essential to the validity of the transfer is stated clearly in the opinion in *Auditor General v. Bassett's Estate*, 246 Mich. 440, where it was said (pp. 451-452):

> "Shares of stock in a corporation constitute a species of incorporeal property. Stock certificates are not stock. They are merely evidence of the existence and ownership of stock. *Lipscomb's Adm'r. v. Condon*, 56 W. Va. 416. The ordinary method of transfer is by indorsement and delivery of the certificate with power of attorney to make transfer on the books of the corporation. *Lebrecht v. Nellist*, 184 Mo. App. 335. This is usually followed by actual transfer on the corporate books and issue of new certificate in the name of the transferee. The ordinary method, however, is not exclusive. Thus, unissued stock may be sold without obtaining a certificate, *Ford v. Howgate*, 106 Me. 517; stock may be sold without delivery of certificate or power of attorney to transfer it on the corporate books, *Lipscomb's Adm'r. v. Condon, supra;* it may be assigned by separate instrument, *Brown v. Hotel Association of Omaha*, 63 Neb. 181; it may be transferred by bill of sale or any sufficient mode for passing title to a chose, *Young v. New Pedrara Onyx Co.*, 48 Cal. App. 1; it is not necessary that the certificate be physically delivered or indorsed or transferred on the books, *Grissom v. Sternberger*, 10 Fed. (2d) 765; even a statutory method of transfer is cumulative, not exclusive, 5 C. J. p. 898; the equitable title may be transferred by mere delivery of the certificate and without written assignment, 2 L. R. A. (N. S.) 804, note."

The essential difference between death and other forms of taxation is brought out by considering the taxation of

bonds of the United States. No state may levy a general property tax upon United States bonds, for to do so would hamper the operation of the Federal Government, but the state of domicile of the owner of such bonds may impose a death tax upon their transfer (see *Plummer v. Coler*, 178 U. S. 115). The latter tax is upon the transfer of property and not upon the property itself. This difference justifies the rule contended for that taxation of the transfer is restricted to the state where the property is and where the transfer takes place, that is, the domicile of the decedent, and this is true of intangibles of every kind.

POINT II.

A tax imposed by the state of domicile of a corporation only upon transfers of shares of stock of such corporation effected by the death of the owner would be based upon an arbitrary, unreasonable and capricious classification within the condemnation of the Fourteenth Amendment to the Constitution of the United States.

The State of Maine bases its right to impose a death tax upon the transfer of the shares of the Great Northern Paper Company owned by the decedent at the time of his death and transferred upon the happening of that event upon the fact that said corporation is incorporated under the laws of that state and because of its claim that under those laws the transfer is not completed until it is recorded on the books of the corporation. Maine does not pretend to have any right to control the succession to the shares, which is entirely governed by the laws of Massachusetts, the state of domicile of the owner. Maine's tax is, therefore, purely a tax upon the transfer of the shares, as distinguished from a succession or inheritance tax. If it be

conceded that the state of domicile of the corporation has the power to impose a tax upon the transfer of its shares, such right would be limited to the imposition of a tax upon all transfers, whether made by a natural person or a corporation and whether made *inter vivos* or by reason of death of the owner. The essential basis for the imposition of a tax upon a transfer effected by death is the power of control over the succession to the property, which justifies the classification of such transfers differently from all other transfers. Where control of the succession is absent, the basis for taxing the transfer at death disappears and such a transfer may not be classified differently from any other transfer. For the State of Maine, or any other state, to tax all transfers of shares of stock in domestic corporations would be one thing; for it to single out transfers taking effect upon the death of the owner of shares and subject such transfers alone to a tax is entirely different. It is purely arbitrary, unreasonable and capricious to tax transfers effected by death and not to tax other kinds of transfers when the power to tax is founded upon a general power to tax transfers and is not a particular power to tax transfers at death derived from control over succession. The statute of Maine under which the tax was assessed is one which taxes transfers occasioned by death and, although the power of classification for taxation is extremely broad and submits to but few restrictions, nevertheless it is quite unreasonable to include under such a statute the taxation of transfers of stock taking place upon death when no tax is asserted with respect to other transfers of stock and the succession does not take place under the laws of Maine.

So far as concerns the power to impose a death tax on the transfer of the shares, Maine is in much the same sit-

uation as was Pennsylvania in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*. Mr. Frick owned tangible personal property situated in the State of New York at the time of his death. Pennsylvania claimed the right to tax it because Mr. Frick was domiciled in that state, basing its claim on the allegation that the property passed under its laws. This Court decided otherwise, holding that the property passed under the laws of the State of New York and pointing out that even though New York did permit the Pennsylvania laws to govern the succession, it was not because the Pennsylvania laws had any virtue in New York but because New York had seen fit to adopt them and make them its own. Maine had no more control over the succession to the shares of stock than Pennsylvania had over the succession to the tangible personal property situated in New York. Maine's right to tax the transfer of the shares, if it had any such right, was founded upon a general power to tax the transfer of all shares issued by its domestic corporations, and it had no right to discriminate against shares transferred by virtue of the death of the owner in favor of shares transferred in other ways. White horses and black horses cannot be separately classified for taxation. If horses of one color are taxed, horses of other colors must also be taxed in the same manner. Race horses and work horses may be separately classified and subjected to tax burdens which differ. The difference between the transfer of the shares at death and the transfer of shares in some other way, so far as Maine is concerned, is no greater than the difference which exists between a black horse and a horse of another color. The transfer of the shares at death cannot be made a race horse and other transfers of shares work horses.

The principles of classification invoked under this point are too familiar to require detailed statement and examination. We are content to cite a few of the leading cases.

Home Insurance Co. v. New York, 134 U. S. 594;
Southwestern Oil Co. v. Texas, 217 U. S. 114;
Keeney v. New York, 222 U. S. 525, *supra;*
Citizens' Telephone Co. v. Fuller, 229 U. S. 322;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132;
F. S. Royster Guano Co. v. Virginia, 253 U. S. 412;
Watson v. Comptroller, 254 U. S. 122;
Heisler v. Thomas Colliery Co., 260 U. S. 245;
Stebbins v. Riley, 268 U. S. 137;
Schlesinger v. Wisconsin, 270 U. S. 230.

All of which is respectfully submitted.

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